REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE-TOWN

JUDGMENT

Case no: CA18/11

Reportable

In the matter between:

ADT SECURITY (PTY) LTD	**Appellant**
and	
NATIONAL SECURITY & UNQUALIFIED WORKERS UNION	**First Respondent**
CAPE TOWN METRO MMUNICIPALITY	**Second Respondent**
INSPECTOR B. BOTHA N.O	**Third Respondent**

Heard: **24 May 2012**

Delivered: **September 2012**

JUDGMENT

HLOPHE AJA

INTRODUCTION

[1] This is an appeal against the findings and order made by Steenkamp J in the Labour Court in terms of which the learned judge found that:

1.1 The First Respondent was entitled to rely upon the Regulation of Gatherings Act, 205 of 1993 ("the RGA") and its right to demonstrate and gather;

1.2 The gathering would not amount to a breach of contract;

1.3 That the gathering was lawful in terms of the provisions of the RGA;

1.4 That the Labour Relations Act 66 of 1995 ("the LRA") does not limit the right of the First Respondent to gather and picket in relation to the issues in dispute between the Appellant and the First Respondent;

1.5 That the planned gathering was lawful; and

1.6 That the Appellant did not satisfy the requirements for a final Interdict.

[2] The Appellant is seeking an order on appeal in the following terms:

2.1 Upholding the appeal;

2.2 Declaring that the First and/or Second Respondents' March and picket on 5 September 2011 was unlawful;

2.3 Interdicting the First and Second Respondents from engaging in any further marching and/or picketing in support of their grievances until such time as they have complied with the provisions of section 64(1) of the LRA.

[3] The Appellant, ADT Security (Pty) Ltd, is a company with limited liability incorporated in terms of the Companies Act 61 of 1973, and is involved in the business of providing armed response, monitoring and guarding services.

[4] The First Respondent is the National Security and Unqualified Workers Union, a registered trade union in terms of the LRA and a body corporate capable of suing and being sued in its own name. The Union is cited in these proceedings in its individual and representative capacities.

[5] The Second Respondent is the Cape Town Metro Municipality, a municipality established in terms of the Local Government Municipal Structures Act 117 of

1998. To the extent that the Second Respondent does not oppose the appeal, no relief is sought against the Second Respondent.

[6] The Third Respondent is inspector Botha, acting in official capacity as a Responsible Officer in terms of the RGA. To the extent that the Third Respondent does not oppose the appeal, no relief is sought against the Third Respondent.

BACKGROUND FACTS

[7] The facts are by large not in dispute and can be summarised as follows. The Appellant approached the Court *a quo* for an interdict prohibiting its employees who were the members of the First Respondent to participate in a planned *"march"* at the Appellant's head offices, which had been organised and/or called for by the First Respondent. The Appellant sought to interdict the gathering on the basis that it was unlawful. The Appellant's cause of action was twofold: Firstly, that the "march" and/or picket planned was unlawful because it circumvented the provisions of the LRA, and secondly; that the "march" and/or picket would constitute a breach of contract. In support of the application, the Appellant contended that it does not recognise the First Respondent as a collective bargaining agent as the First Respondent had not acquired organisational rights in terms of the LRA. The Appellant only deducts trade union subscriptions from its employees' remuneration and remits same to the First Respondent on a monthly basis; therefore save for such "organisational right", the First Respondent has no other organisational right as contemplated in the LRA.

[8] The First Respondent, however, rather than relying on the mechanisms afforded to it in terms of the LRA, applied to the Second Respondent to have a gathering in terms of section 3 of the RGA. In terms of the RGA, a "*gathering"* is defined as *"any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act 29 of 1989 or any other public place or premises, wholly or partly open to the air, and it includes, inter alla, a gathering held to hand over petitions to any person or to mobilise or demonstrate support for, or opposition to the views,*

principles, policies, actions or omissions of any person or body of persons or institution, including any government administration or governmental institution". The march was scheduled to take place on 5 September 2011. The First Respondent was given permission to march by the Second Respondent and in terms of section 4(4) of the RGA an agreement was reached between the Third Respondent, and the convenor, as well as authorised members of the South African Police Services and the Metro Police and the traffic services. The agreement set out that the gathering should be in the form of a procession. Furthermore, it should strictly follow a defined route. Upon receiving permission from the Second Respondent, the First Respondent organised and planned a "march" at the Appellant's head offices in reaction to the Appellant's refusal to grant organisational rights to the First Respondent.

[9] In the Court *a quo*, Steenkamp J held that the "march" and/or picket was lawful because it was sanctioned by Section 17 of the Constitution of the Republic of South Africa Act of 1996 ("the Constitution"). Section 17 of the Constitution gives effect to the right to assemble, demonstrate and picket, which right was given effect to by the RGA. The right that the First Respondent sought to exercise was not premised on any provision of the LRA. In that they (the First Respondent) did not seek to engage in strike action as defined within the LRA, but rather, the First Respondent relied on Section 17 of the Constitution as given effect to by the RGA. In addition, the Appellant itself did not argue that the planned "march" and /or gathering fell within the definition of a strike. The Appellant merely contended that the planned march was unlawful. In this regard, the Court *a quo* thus held that the right afforded by Section 17 of the Constitution is a right extended to everyone and not just employees. However, the right is limited by the provisions of the RGA. One of those limitations is the prerequisite to give notice and to provide the necessary information to the relevant authority. The Court held that in this regard it was common cause that such notice had been given to the Second Respondent. Furthermore, the Second Respondent had granted the First Respondent permission to proceed with the planed "march" and/or gathering.

[10] Steenkamp J further held that the planned march did not constitute a breach of contract as the members of the First Respondent who would be participating in the planned "march" were not obliged to tender their services to the Appellant during the time of the planned protest as they (employees) would be off duty at the said time, and as a result, their participation would not amount to a breach of contract. The Court *a quo* therefore held that the Appellant had not satisfied the requirements of a final interdict and the application was accordingly dismissed.

ISSUES TO BE DICEDED

[11] The issues on appeal are the following:

11.1 Does the Labour Court have jurisdiction to determine the compliance or otherwise by the First Respondent and its members, with the RGA, in an employment related dispute?

11.2 If it does, is the exercise by the First Respondent and its members of their constitutionally protected right (section 17 of the Constitution) to assemble, march, demonstrate, picket and present petitions through the mechanisms of the RGA prohibited by the LRA or against public policy or in conflict with the LRA?

APPLICABLE LAW

[12] In short, the Appellant's case, as presented in the Court *a quo* and on appeal, is that there is a concern over matters regulated by the RGA and the interplay between protest action in terms of the LRA and picketing in terms of the RGA. This Court therefore is tasked with the duty of dealing with the right of off-duty employees who wished to march, gather and picket for purposes of handing over a petition to senior management concerning disputes of right and interest that are covered by labour law.

Jurisdiction

[13] In my view, the law, in the form of provisions contained in labour legislation, and in particular Section 157 of the LRA, clearly establishes the Labour

Court's powers to grant an interdict. Section 158 (a)(III) empowers the Labour Court to make an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of the LRA. The labour Court has similar powers under the Basic Conditions of Employment Act 75 of 1997 ("the BCEA"), in terms of Sections 77(3) and 77A. In terms of Section 77(3), the Labour Court is entitled to adjudicate a dispute concerning a contract of employment and Section 77A empowers the Labour Court to make any appropriate order. Similarly, the Labour Court has broad powers, under section 50 of the Employment Equity Act 55 of 1998 ("EEA"), to make any appropriate order. When a party does not follow the conciliation and arbitration process, the Labour Court, by implication of Section 157 read with Section 158, has the power to interdict or issue a declarator in order to achieve the objects of the LRA. Therefore, the Court *a quo*, per Steenkamp J, correctly exercised jurisdiction over the dispute.

The Right of off-duty Employees, who wishes to march, gather and picket for purpose of handing over a petition to senior management concerning disputes of right and interest that are covered by Labour Law

[14] The Appellant framed its cause of action in the first instance on the basis that the employees were circumventing the provisions of the LRA and in the second instance on a breach of contact. Counsel of the Appellant, Mr F A Boda, argued that the LRA constitutes specialised legislation, which deals specifically with matters and issues that emanate from the workplace, and more specifically, provides a framework within which collective bargaining is regulated. It was further submitted that in terms of the LRA, insofar as disputes of interest and disputes of right are concerned, the LRA places an obligation on employees to refer all interest disputes to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") and/or Labour Court for conciliation and/or adjudication before any action against an employer is taken. Counsel for the Appellant argued in the Court *a quo*, that the Union and its members did not refer any dispute to conciliation, nor did they comply with the requirements of the LRA insofar as their disputes of right are

concerned, in particular the demand relating to organisational rights. Section 22 of the LRA obliges parties to refer any dispute regarding organisational rights to the CCMA for conciliation and, if need be, to arbitration.

[15] In essence, the Appellant submitted that such non-compliance and use of the provisions of the RGA as an alternative mechanism, amounts to the circumvention of the provisions of the LRA. This Court must accordingly determine whether the reliance by the Union on the provisions of the RGA and/or Constitution amounts to a circumvention of the provisions of the LRA. Section 210 of the LRA clearly provides that "If any conflict relating to matters dealt with in this Act, arises between this Act and the provisions of any other Act, save for the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail."

[16] It is the Appellant's submission that, as the RGA does not require nor provide for conciliation, there arises a clear conflict between the two statutes. However, in this regard, the wording of section 210 of the LRA unambiguously instructs the supremacy of its provisions in instances of such conflict, with the exclusion of provisions contained in the Constitution and/or amending legislation.

[17] The Court was referred to various decisions in support of the contention advanced above. Reference was made *inter alia* to *ADT Security (Pty) Ltd v SATAWU*[1], *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*[2] and *Chirwa v Transnet Ltd & Others*[3]. As submitted by Counsel for the Appellant, and confirmed in Constitutional Court decisions of *Sidumo* and *Chirwa*, the LRA was a product of negotiation between labour and management through the National Economic Development and Labour Council Act 35 of 1994 ("NEDLAC") which requires all labour legislation to be negotiated through an integrated framework in which organised labour and management may engage one another over the full range of industrial issues. Furthermore, the LRA comprehensively regulates employment disputes and

[1] Case number J1099/08 of 13 June 2008.
[2] (2007) 12 BLLR 11997 (CC).
[3] (2008) 2BLLR 97 (CC).

employee's right to picket in respect of matters related thereto. The RGA was, however, not negotiated through NEDLAC, and therefore, the inference is that the Legislature could not have intended for the RGA to apply in matters that are comprehensively dealt with in specialised legislation. In particular, the Legislature could not have intended for the right to a gathering or picket which is afforded to "everyone" by the RGA, to apply in employment related matters which are expressly provided for within the LRA.

[18] In *Sidumo*, Navsa AJ held that "the LRA is a specialised negotiated legislation giving effect to the right to fair labour practices"[4] and "for more than a century courts have applied the principle that general legislation, unless specifically indicated, does not derogate from special legislation."[5] Skweyiya J in *Chirwa* took the matter a step further and held that in his view the existence of purpose-built employment framework in the form of the LRA and associated legislation implies that labour processes and forums should take precedence over non-purpose built processes and forums in situations involving employment related matters.[6] Furthermore, only the Constitution itself or a statute that expressly amends the LRA can take precedence in application to such labour matters.[7]

[19] In *NAPTOSA & Others v Minister of Education of Western Cape & Others*[8], the Cape High Court held that a litigant may not bypass the provisions of the LRA and rely directly on the Constitution without challenging the provisions of the LRA on constitutional grounds.[9] Conradie J (as then was) further held that to grant relief which would encourage the development of two parallel systems would in his view be singularly inappropriate. Taking into account the right to fair labour practices and the duties imposed thereby on employers and employees alike. It is not a right which can, without an intervening regulatory

[4] Supra note 1 at para 94.
[5] Ibid at para 102.
[6] Supra note 2 at para 41.
[7] Ibid at para 50.
[8] 2001 (2) SA 212 (C).
[9] Ibid at 1231.

framework, be applied directly in the work place. The social and policy issues are too complex for that.[10]

[20] The Constitutional Court in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* (*Treatment Action Campaign and Another as Amici Curiae*)[11], per Ngcobo J (as he then was), held, "that there was considerable force in the approach taken in Naptosa." The Learned Judge noted that if it were not to be followed, the result might well be the creation of dual systems of jurisprudence under the Constitution and under legislation.[12]

[21] The *dictum* in *Naptosa*, as applied in *New Clicks*, was confirmed by the Constitutional Court per O'Regan J in *South African Defence Union (SANDU) v Minister of Defence*[13] where the Court held:

> *"Accordingly a litigant who seeks to assert his or her right to engage in collective bargaining under s 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on s 23(5). If the legislation is wanting its protection of the s 23(5) right in the litigant's view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task conferred upon the Legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. The proper approach to be followed should legislation not have been enacted as contemplated by s 23(5) need not be considered now*."

[22] Mr Boda further submitted that Section 67 of the LRA provides that a person does not commit a breach of a contract by taking part in a protected strike or protected lock-out. Therefore, this signifies that only employees embarking on a protected strike, in accordance with the provisions of the LRA, are protected from civil proceedings against them. Mr Boda also submitted further that, in this instance, the First Respondent planned a gathering and/or picket in terms

[10] Supra note 8 at 123A-C.
[11] 2006 (2) SA 311 (CC).
[12] Ibid at paras 434-437.
[13] 2007 (5) SA 400 (CC) at para 51.

of RGA and the RGA does not provide employees with immunity from breach of contract claims if they participate in protest action.

[23] It is the Appellant's submission that, although the employees are not obliged to render services during non-working hours, their breaks cannot absolve them from remaining loyal to the employer. In addition, employees have a duty to maintain the integrity of the employer-employee relationship, and off-duty misconduct may entitle an employer to cancel the contract. Therefore, by protesting, the employees breached their duty of good faith and loyalty, and as a result committed misconduct under common law.

[24] Of particular significance is the dictum of Cele AJ in SATAWU, where the Labour Court held:

> *"..we have here employees who, if I have to accept their contention, will be out of duty on that day, will be working nightshift, but they will be going to the place of employment. In other words, it is the head office that is the place where the employer is based, they will be making demands that are work-related, as these demands have been listed clearly here. Therefore in my view, the demands that they seek to make are indeed demands that can be made under the collective bargaining. If these employees had sought to go out and march, had sought to go out and picket on any other issues that are not employer/employee related, I would have seen the matter differently because at their time they would have been free to engage themselves under the protection they have, the right of assembly as is a right enshrined in the Constitution…clearly the respondents in this respect are circumventing the clear provisions of the Labour Relations Act without challenging the Act…and as a conclusion, I do find that such would be unlawful in the circumstances*."[14]

[25] In the appellant's supplementary submissions, Mr Boda further submitted that the right to picket was not exercised with due regard to the appellant's rights under the LRA, which require disputes relating to organizational rights to be

[14] Supra note 1 at para 10.

referred first for conciliation, and if that fails, for arbitration or at the election of the Union, and the workers by exercise of protected action in terms of the LRA.

[26] In advancing the above submission, the appellant relied on the Constitutional Court decision of *South African Transport and Allied Workers Union (SATAWU) & one other v Jacqueline Garvas and 8 others.*[15] In this matter, the First Applicant, SATAWU, organised a gathering of thousands of people, in an attempt to register certain employment-related concerns of its members within the security industry. The gathering was organised in terms of Section 17 of the Constitution. In this regard the court held:

> *"The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principle means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms…Freedom of assembly is no doubt a very important right in any democratic society. Its exercise may not, therefore, be limited without good reason…The fact that every right must be exercised with due regard to the rights of others cannot be overemphasised."*[16]

APPLICATION OF THE LAW TO FACTS

[27] Steenkamp J in the Court *a quo* distinguished the present matter from the matter in SATAWU, and held that despite the Appellant's contention, the First Respondent in this case had carefully stated that it was not relying on the right to collective bargaining but rather was relying on the right to demonstration and gathering. Furthermore, the First Respondent contended that the issues behind its contemplated gathering or march were not limited to

[15] Case number CCT 112/11 (2012) ZACC 13 (as yet unreported).
[16] Ibid at para 61-69.

the LRA issues; there were further issues that would be detailed in the memorandum to be handed over on the day of the march. As a result, the Court *a quo* therefore held that the First Respondent did not rely on its rights protected by the LRA; neither did it rely on the constitutional right to fair labour practices as set out in section 23 of the Constitution. The First Respondent relied on section 17 of the Constitution. It did not do so directly. It relied on the applicable legislation which regulates the rights to assemble, demonstration, picket and petition as set out in section 17 of the Constitution, and the Regulation of Gatherings Act.

[28] Steenkamp J further held:

> *"…a further relevant factor to be taken into account is that, as I have pointed out before, the workers that will take part in the march…will be off duty. Therefore their participation in such a march will not be a breach of contract; neither will it form part of a strike as defined in the LRA. The workers will not be withholding their labour. It appears to me, therefore, that the planned gathering may be inconvenient to the applicant and it may even be said to be contrary to the spirit of the Labour Relations Act insofar as the Union could also have sought to embark on a protected strike and did not do so, but that does not make the planned gathering unlawful. The gathering is clearly lawful in terms of the provisions of the Gatherings Act. That Act limits the constitutional rights set out in section 17, only to the extent necessary. It would be undesirable for this court, where legislation exists that limits a constitutional right, to limit that right further.*"

[29] In my view Steenkamp J, correctly found that the members of the First Respondent who would be participating in the planned "march" were not obliged to tender their services to the Appellant during the time of the planned protest as they (employees) would be off duty at that time, and, as a result, their participation would not cause irreparable harm to the Appellant, nor would it amount to a breach of contract. Furthermore, it must be taken into consideration that the right to a gathering provided for in the RGA is, in

essence, a constitutional right entrenched in Section 17 of the Constitution, given effect to by the RGA.

[30] Section 1 of the LRA states that the primary object of the LRA is 'to give effect to and regulated the fundamental rights conferred by section 23 of the Constitution'. It cannot be correct to allow a litigant to bypass the LRA and approach the magistrates' court directly. As stated in the *Chirwa* case, a litigant cannot avoid dispute resolution mechanisms provided for in the LRA by alleging a possible violation of a constitutional right as that would undermine and frustrate the very primary objects of the LRA, unless as per *dictum* by Cele AJ. In *Satawu supra*, the litigant is challenging the constitutionality of the legislation and it can be shown that the violation falls within the ambit of section 36 of the Constitution; however, this is not applicable in the current matter. The present dispute is one to which the approach adopted by the Constitutional Court in *Gcaba v Minister of Safety and Security and others* [2010] 1BCLR 35(CC*)* at para 56 is clearly applicable.

> *"The legislature is sometimes specifically mandated to create detail legislation for a particular are, like equality, just administration action (PAJA) and labour relations (LRA). Once a set of carefully crafted rules and structures have been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasized in Chirwa by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely tuned dispute resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees…*"

The dispute here in one concerning organisational rights and should accordingly be dealt with in accordance with the procedure contemplated in section 22 of the LRA.

[31] The duty of good faith extends even outside normal working hours. Accordingly, it cannot be an excuse to say workers were merely picketing

during their lunch hour which they had sacrificed. There can be no doubt that picketing at the employer's head office even during their lunch hour could impact on the employer's good will and reputation. In the light of the conclusion to which we have come, it is not necessary to decide the point about the good faith.

RELIEF

[32] In conclusion, the First Respondent, in relying on the provisions of the RGA in participating in the gathering, was in fact circumventing the provisions of the LRA, even though the participation of off-duty employees in the march did not amount to a breach of contract as they did so at their time. The First Respondent ought to have made use of the procedures afforded to them by the LRA, which contains carefully crafted rules to deal with the specific kind of activity engaged in by respondent.

Order

[33] I accordingly make the following order:

1. The order of the Court *a quo* if set aside.

2. The appeal is upheld with costs, such costs to include those incurred in the employment of two counsels.

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Hlophe AJA

Davis JA and Murphy AJA agreed.

APPEARANCES:

FOR THE APPELLANT:	Adv F Boda
	Instructed by Routledge Modise Inc t/a Evershed
FOR THE FIRST RESPONDENT:	PJ Pretorius SC
	Instructed by Tonlinson &Mnguni Attorneys

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